# STATE OF MICHIGAN

# COURT OF APPEALS

JENNIFER WORTHING, Personal Representative of the Estate of SUSAN WORTHING, Deceased,

Plaintiff-Appellant,

v

MCLAREN REGIONAL MEDICAL CENTER, GARY WEASE, M.D., JEFFREY GAUVIN, M.D., and GARY VERCRUYSSE, M.D.,

Defendants-Appellees.

UNPUBLISHED
August 7, 2007

No. 258041
Genesee Circuit Court
LC No. 03-076159-NH

Before: Cavanagh, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this wrongful death action alleging medical malpractice, plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7). We affirm.

## I. Basic Facts and Procedural History

This case arises from the October 2, 2000 death of Susan Worthing following defendants' treatment of injuries that she received in an automobile accident on September 30, 2000. Plaintiff was issued letters of authority appointing her personal representative of Worthing's estate on October 31, 2000, and, on October 29, 2002, served defendants with notice of her intent to file a medical malpractice claim in connection with Worthing's death. Subsequently, plaintiff filed this medical malpractice claim in the trial court on April 25, 2003.

Our Supreme Court thereafter released its decision in *Waltz v Wyse*, 469 Mich 642, 644, 650; 677 NW2d 813 (2004), wherein it held that the notice of intent tolling provision of MCL 600.5856(d)[1] does not toll the two-year period for commencing an action as personal

[1] MCL 600.5856 was amended by 2004 PA 87, effective April 22, 2004. As part of this amendment MCL 600.5856(d) was reworded in a manner that does not change the substantive meaning of the provision, and then reassigned as MCL 600.5856(c). Because much of precedent discussed in this opinion and the events relevant to the timeliness of plaintiff's complaint (continued…)

representative of a decedent's estate provided for by the wrongful death saving provision of MCL 600.5852, but rather, "by its express terms, tolls only the applicable 'statute of limitations or repose.'" Relying on *Waltz*, defendants moved for summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(7), arguing that because plaintiff failed to file her complaint within the two-year saving period set forth in MCL 600.5852, i.e., by October 31, 2002, her claim for medical malpractice was time-barred despite the fact that notice of her intent to file suit was given within the saving period.

In response to the motion, plaintiff argued that the Supreme Court's decision in *Waltz* should be given prospective application only, because it overruled prior precedent on which plaintiff had relied for the proposition that the giving of notice pursuant to MCL 600.2912b tolled the saving period in MCL 600.5852. Plaintiff alternatively argued that under *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003), the successor personal representative who had been appointed on August 25, 2004, was entitled to two years from the date of his appointment in which to pursue the action, or five years from the date of the malpractice, whichever is less.

At the hearing on defendants' motions, plaintiff supplemented her response by arguing that *Waltz* had no application to the instant case because, unlike her, the plaintiff in *Waltz* had filed suit beyond the five-year ceiling contemplated in MCL 600.5852, specifically three years after the expiration of the two-year medical malpractice period of limitation set forth in MCL 600.5805(5).[2] Plaintiff reasoned that because the five-year ceiling in this case would not be reached until October 2, 2005, the trial court should permit the successor personal representative to pursue the action. But the trial court held that *Waltz* applied retroactively and that *Eggleston* did not compel a different result. Consequently, the trial court granted defendants' motions and dismissed the action with prejudice.

## II. Analysis

Plaintiff contends that the trial court erred by dismissing her suit as untimely and with prejudice. A trial court's decision on a motion for summary disposition is reviewed de novo. *Waltz*, *supra* at 647. "Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations." *Id.* "Whether a period of limitation applies to preclude a party's pursuit of an action" is a legal question that this Court also considers de novo. *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

Plaintiff undisputedly commenced this suit more than six months beyond the two-year medical malpractice period of limitation, MCL 600.5805(5), which expired at the latest on October 2, 2002, the second anniversary of the last possible date of malpractice potentially

(…continued)

occurred before the effective date of 2004 PA 87, we will refer to the arrangement of MCL 600.5856 before its amendment.

[2] Pursuant to 2002 PA 715, MCL 600.5805(5) was renumbered as MCL 600.5805(6) effective March 31, 2003. Because MCL 600.5805(5) prescribed the period of limitation applicable at the time plaintiff's cause of action accrued, MCL 600.5838a(1), we will refer in this opinion to MCL 600.5805(5).

committed by defendants. MCL 600.5838a(1). No tolling of the medical malpractice period of limitation occurred pursuant to MCL 600.5856(d) because plaintiff gave defendants notice of her intent to sue *outside* the two-year period of limitation. See *Waltz, supra* at 651 (explaining that "to toll the period under § 5856(d), [the] plaintiff was required to provide notices of intent in compliance with the provisions of MCL 600.2912b before the expiration of the two-year limitation period").

With respect to the potential applicability of MCL 600.5852, the probate court issued plaintiff letters of authority appointing her the personal representative of the decedent's estate on October 31, 2000. Therefore, plaintiff had two years from that date, until October 31, 2002, to commence a wrongful death medical malpractice action. Plaintiff, however, untimely filed suit on April 25, 2003, nearly six months after the expiration of the extended medical malpractice period of limitation provided for by the wrongful death saving provision. Contrary to plaintiff's suggestion, the three-year period mentioned in the second sentence of MCL 600.5852 does not establish a wrongful death saving period separate from the period of two years after issuance of letters of authority. See *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 573 n 16; 703 NW2d 115 (2005). Consequently, plaintiff commenced this action outside both the two-year medical malpractice period of limitation and the two-year wrongful death saving provision in § 5852.

Plaintiff suggests that her complaint nonetheless qualifies as timely because she gave defendants notice of her intent to sue within the two-year wrongful death saving period of MCL 600.5852. However, as discussed above, plaintiff commenced this action on April 25, 2003, beyond the two-year medical malpractice period of limitation, which began running by October 2, 2000, and outside the wrongful death saving provision that afforded her two years to file this claim from the date she received her appointment as the personal representative of the decedent's estate, October 31, 2000. Although on October 29, 2002, plaintiff gave defendants notice of her intent to file a medical malpractice action against them, the Supreme Court clarified in *Waltz, supra* at 650-651, that a wrongful death medical malpractice plaintiff's filing of the mandatory notice of intent to sue pursuant to MCL 600.2912b does not operate to toll the running of the wrongful death saving period in MCL 600.5852. MCL 600.5856(d). Consequently, that plaintiff provided such notice within the saving period does not render her April 25, 2003 complaint timely.

To the extent plaintiff suggests that the Supreme Court's decision in *Waltz* does not retroactively apply to this case, in which the relevant procedural events occurred before the *Waltz* ruling, we note that a special panel of this Court has resolved a conflict on this issue in favor of retroactive application. See *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503; 722 NW2d 666 (2006). We are bound to follow *Mullins*, see MCR 7.215(J)(1), and to therefore apply *Waltz* retroactively to this case.[3]

[3] We note, however, that the Supreme Court has granted leave to appeal this Court's decision in *Mullins, supra*. See *Mullins v St Joseph Mercy Hosp*, 477 Mich 1066 (2007).

Plaintiff further suggests that *Waltz* is distinguishable because unlike the plaintiff in that case, in this case she gave defendants the notice of intent to sue during the two-year wrongful death saving period *and* subsequently filed suit within five years of the last potential medical malpractice accrual date. This Court, however, rejected this same argument in *Farley*, *supra* at 568, 574-575, where, noting that "the three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; [but rather] only a limitation on the two-year saving provision itself," the panel found that "this factual distinction makes no difference." Under *Farley*, plaintiff's provision of notice of intent to file the instant medical malpractice action did not toll the wrongful death saving period, and the trial court properly granted defendants summary disposition pursuant to MCR 2.116(C)(7).

In reaching this conclusion, we reject plaintiff's assertion that application of the *Waltz* decision to her case violates her right to due process because it effectively shortens the applicable limitations period. As noted by this Court in *Farley*, *supra* at 576 n 27, the Michigan Supreme Court in *Waltz*, *supra* at 652 n 14, rejected the plaintiff's argument that the *Waltz* decision shortened the two-year saving period provided by MCL 600.5852. Therefore, there is no basis for plaintiff's constitutional challenge.

Plaintiff also requests that we apply the doctrine of equitable tolling because applying *Waltz* retroactively will unfairly deprive the estate of its claim. Pursuant to this Court's decision in *Ward v Siano*, 272 Mich App 715, 717-720; 730 NW2d 1 (2006), however, a plaintiff may not rely upon the doctrine of equitable tolling to escape the retroactive effect of our Supreme Court's decision in *Waltz*. We cannot, therefore, apply the doctrine to reverse the trial court's grant of summary disposition in favor of defendants. MCR 7.215(J)(6).

Plaintiff also avers that rather than dismiss her suit with prejudice, the trial court should have denied the motion for summary disposition and permitted the successor personal representative to recommence this action. As already discussed, however, plaintiff's complaint was properly dismissed by the trial court as untimely. Because this dismissal constitutes an adjudication of the merits of plaintiff's suit, the successor personal representative is barred by res judicata from pursuing the matter in a subsequently filed complaint. See *Washington v Sinai Hosp of Greater Detroit*, ___ Mich ___; ___ NW2d ___ (2006). Furthermore, substituting the successor personal representative into the present action is unavailing because this action would remain untimely despite the substitution. See *McMiddleton v Bolling*, 267 Mich App 667, 673-674; 705 NW2d 720 (2005); cf. *Eggleston*, *supra* (where the original personal representative had not already untimely commenced a medical malpractice action on behalf of the estate when the successor personal representative received letters of authority). The trial court's grant of summary disposition with prejudice was, therefore, proper.

Accordingly, we affirm the trial court's order granting summary disposition of plaintiff's claim in favor of defendants and with prejudice.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey

I concur in result only.

/s/ Mark J. Cavanagh